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No. 00-1406

In The

Supreme Court of the United States

CHEVRON U.S.A., INC.,

Petitioner,

v.

MARIO ECHAZABAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF EMPLOYERS GROUP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER CHEVRON U.S.A., INC.

FRED W. ALVAREZ
Counsel of Record
CHRISTINE A. KENDRICK
WILSON SONSINI GOODRICH & ROSATI
650 Page Mill Road
Palo Alto, California 94304
(650) 493-9300
Counsel for Amicus Curiae Employers Group

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether a person who is unable to carry out the essential functions of the position sought or held without great risk to his own health or safety is a "qualified individual with a disability" and whether physical, medical and safety criteria are valid qualification standards under the Americans with Disabilities Act of 1990 ("ADA").

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BRIEF OF *AMICUS CURIAE* EMPLOYERS GROUP IN SUPPORT OF CHEVRON U.S.A., INC.'S PETITION FOR WRIT OF CERTIORARI

Amicus Curiae Employers Group respectfully submits its brief in support of Chevron U.S.A., Inc.'s Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF INTEREST OF *AMICUS*[1]

Amicus Curiae Employers Group, formerly known as the Merchants Manufacturers Association and Federated Employers, is headquartered in California, and is one of the nation's oldest and largest human resources management associations. It represents nearly 5,000 companies of all sizes and in every industry, employing in the aggregate approximately 2.5 million employees. Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over many decades, Employers Group is uniquely able to assess both the impact and implications of the legal issues presented in employment cases like this one.

Liability for disability discrimination or risk of serious harm or even death – that is the dilemma that the Ninth Circuit has imposed on employers by its recent

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel, made a monetary contribution to the preparation and submission of this brief.

opinion in *Echazabal v. Chevron U.S.A., Inc.* App. 1a-24a. The Ninth Circuit's opinion in *Echazabal*, authored by Judge Reinhardt, squarely holds that employers must hire a disabled applicant even though performing the essential functions of the position creates a risk of grave harm to that individual. According to the Ninth Circuit, the disabled individual, not the employer, decides whether to accept such risks. "Under the ADA, an employer may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health." *Id.* at 8a.

This conclusion, however, ignores two critical parts of the ADA analysis, namely, whether the individual is "qualified" to perform the essential functions of the position and whether safety, medical and other physical criteria are permissible because they are job-related and consistent with business necessity. To be qualified, a disabled individual must be able to perform the job safely and without great risk to his or her health. Holding otherwise, as the Ninth Circuit does, carries anti-paternalism to the extreme. Employers will be forced to offer disabled applicants positions that could knowingly expose them to serious risk of harm, even if doing so will violate not only other federal and state safety laws but also common notions of good sense and decency. Surely, the ADA was not intended to lead to such a result.

The Ninth Circuit's decision in *Echazabal* is not only wrong as a matter of statutory interpretation but, as Judge Reinhardt himself recognizes, it also creates a clear split among the Circuit Courts regarding whether an employer may use medical and safety standards that are job-related and consistent with business necessity to

determine whether a disabled applicant is qualified for a job without risking liability for disability discrimination. App. 5a-6a n.4; *see also* Chevron U.S.A., Inc.'s Writ Petition at 12-21. While a nationwide employer such as Chevron U.S.A, Inc. may adopt and use such safety standards in most states, the *Echazabal* decision virtually precludes the employer's ability to do so at business locations within the Ninth Circuit. Neither disabled individuals nor employers should be placed at greater risk simply because of their physical location. Indeed, both groups would be better served by a uniform and consistent interpretation of these essential provisions of the ADA, an interpretation that only this Court can render.

REASONS FOR GRANTING THE PETITION OF CHEVRON U.S.A., INC.

I. AN INDIVIDUAL CANNOT BE DEEMED QUALIFIED UNDER THE ADA IF HE CANNOT PERFORM THE ESSENTIAL FUNCTIONS OF THE POSITION SAFELY

From a statutory standpoint, Judge Reinhardt's opinion starts from the wrong premise. It analyzes the availability of the so-called "direct threat" defense without first establishing that the employer had discriminated against the employee in violation of the ADA. App. 4a-13a. Because the particular ADA provision reviewed by the Ninth Circuit does not specifically mention whether the safety of the applicant can be considered, the Court leaps to the conclusion that it may never be. Almost as an after-thought, the Ninth Circuit addresses the most fundamental question facing an employer under

the ADA – whether the applicant is a qualified individual with a disability. App. 14a-18a. Had the Ninth Circuit started its analysis by asking this threshold question, it would have determined, under the language of the ADA and the EEOC's implementing regulations, that Mr. Echazabal was not a qualified individual with a disability. Upon such a conclusion, it would have been unnecessary even to address the availability of the "direct threat" defense where the individual poses a threat only to himself and not to others.

To be liable under the ADA, an employer must have committed an act of discrimination. Section 12112(a) of the ADA states the general anti-discrimination rule: "No covered entity shall discriminate against a *qualified individual with a disability* because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (emphasis added). The term "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The EEOC regulations further refine the term "qualified." The disabled individual mu. also satisfy the requisite skill, experience, education and other job-related requirements of the employment position held or sought. 29 C.F.R. § 1630.2(m).

A disabled individual who cannot perform the essential functions of a position safely cannot be deemed qualified under any interpretation of the ADA. Federal cases

throughout the country have concluded that it is not enough for a disabled individual to be physically able to perform the essential functions of a position, with or without a reasonable accommodation, but they must be able to do so safely to be covered by the Act. *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 835-36 (11th Cir. 1998) (epileptic cook held not to be qualified individual with disability because he could not perform essential elements of the position safely); *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447-48 (11th Cir. 1996) (epileptic employee could not safely perform job as product inspector or web operator because both required work with fast moving machinery, some of which was heated to 350 degrees); *see also Huber v. Howard County*, 849 F. Supp. 407, 412-13 (D. Md. 1994), *aff'd*, 56 F.3d 61 (4th Cir. 1995) (asthmatic firefighter held not to be qualified individual with disability because of risk of incapacitation at scene of fire by allergens, variable weather conditions, and hazardous and toxic fumes and substances); *Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991) (holding under Section 501 of the Rehabilitation Act of 1973 that construction inspector with Parkinson's disease was not qualified because of the risk to his own safety); *Davis v. Meese*, 692 F. Supp. 505, 519 (E.D. Pa. 1988) (holding under Rehabilitation Act, that diabetic was not qualified to be a special agent because certain assignments would be too risky for someone who is dependent on insulin), *aff'd*, 865 F.2d 592 (3d Cir. 1989). These holdings recognize that "a common sense element to any job is the ability to complete a task in a safe manner." *Jackson v. Boise Cascade Corp.*, 941 F. Supp. 1122, 1127 (S.D. Ala. 1996).

The Ninth Circuit's opinion disregards this common sense element. It will compel employers to hire the blind ironworker, the claustrophobic miner and the asthmatic granary worker merely because they are willing to accept the obvious risks that their employment would entail. In so doing, the Ninth Circuit eviscerates the statutory right of the employer under the ADA to determine not only the essential functions of the position but also other job-related safety requirements that are consistent with business necessity. App. 14a-18a. Section 12111(8) of the ADA, which provides the statutory definition of "qualified individual with a disability," states that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description *shall* be considered evidence of the essential functions of the job." 42 U.S.C. § 12111(8) (emphasis added); *see also* 29 C.F.R. § 1630.2(n)(3).

In *Echazabal*, the Ninth Circuit recognizes that the employer has the right to determine which functions are essential and that the employer had prepared a written job description including a job-related safety condition that was required to successfully perform the position in the coker unit (*i.e.*, physical tolerance for hydrocarbon liquids and vapors, petroleum, solvents and oils). App. 14a. Nevertheless, the Ninth Circuit, unjustifiably skeptical of the employer's motive, then reaches the illogical conclusion that this job-related safety requirement does not and cannot become an essential function of the job simply because the employer chose to describe it as such. App. 15a. The ability to perform the essential functions

safely is no less important, and indeed may even be more important, to the employer than the disabled individual's ability to perform those same functions competently, with or without a reasonable accommodation. Such safety requirements are so fully integrated with the essential functions that they cannot be separated with the crude analysis employed by the Ninth Circuit. *Id.* This is not, as the Ninth Circuit assumes, an attempt to transform marginal functions into essential ones by adding them to a job description. App. 15a-16a n.9. Rather, it is a legitimate effort by an employer to ensure the safety of its employees as it is required to do under other federal and state laws and which it is permitted to do under the ADA. 42 U.S.C. §§ 12112(b)(6), 12113(a); 29 C.F.R. § 1630.15(e). A disabled individual who cannot perform the essential functions of the position sought or held safely, with or without reasonable accommodation, should be no more qualified under the ADA than the disabled individual who cannot perform those same functions competently.

II. AN EMPLOYER DOES NOT DISCRIMINATE UNDER THE ADA BY USING QUALIFICATION STANDARDS, INCLUDING SAFETY STANDARDS, THAT ARE JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY

By starting from the defense before establishing the requisite discriminatory conduct, the Ninth Circuit also fails to adequately consider an employer's right to establish safety requirements that are job-related and

consistent with business necessity.[2] App. 16a n.10. Because of this failure, the Ninth Circuit expressly rejects the application of a personal safety requirement as a valid qualification standard. *Id.*

Neither the statute nor its regulations support this conclusion. The anti-discrimination provision of Title I of

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[2] The Ninth Circuit rejects the application of a personal safety requirement as a valid qualification standard without even analyzing that term under the ADA. App. 16-17a n.10. The Ninth Circuit considers Rehabilitation Act cases that sanctioned the use of such standards as non-discriminatory but rejects the applicability of those cases under the ADA. *Id.* (citing *Mantolete v. Bolger*, 767 F.2d 1416, 1422-24 (9th Cir. 1985)). The Ninth Circuit incorrectly disregards Rehabilitation Act precedents based on differences in the statutory language. According to the Court's reasoning, because the Rehabilitation Act does not contain a definition of the term "qualified handicapped person," the EEOC regulations, which state that an individual who poses a direct threat to his or her own health or safety is not qualified, are controlling. In the ADA context, the EEOC's regulations related to the term "direct threat" are entitled to no such deference because they expand upon the statutory definition of "direct threat" in sections 12111(3) and 12113(b) of the ADA. App. 16a-17a n.10. The Ninth Circuit, however, appears to have disregarded the Congressional directive in section 12117(b) to federal agencies processing charges of employment discrimination under the ADA and the Rehabilitation Act to ensure consistent and non-conflicting standards for the same requirements under the two Acts. 42 U.S.C. § 12117(b). Clearly, Congress sought to equate the protections of the ADA with those of the Rehabilitation Act. 42 U.S.C. § 12201. Therefore, Rehabilitation Act precedents, which have routinely recognized an employer's right to consider safety in determining whether a disabled individual is qualified, are instructive to interpreting the ADA and should be considered.

the ADA specifically defines prohibited acts of discrimination. 42 U.S.C. § 12112(b); 29 C.F.R. §§ 1630.7, 1630.10. Included on that list is the use of qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria used by the covered entity is shown to be job-related for the position in question and is consistent with business necessity.[3] *Id.*

Not surprisingly, the EEOC itself recognizes that a qualification standard can include physical, medical and safety requirements. According to the EEOC regulations, qualification standards include "personal and professional attributes including the skill, experience, education, *physical, medical, safety* and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired." 29 C.F.R. § 1630.2(q) (emphasis added). This definition makes sense. While the ADA is

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[3] The application of such a qualification standard is also a defense to a charge of discrimination. 42 U.S.C. § 12113(a); 29 C.F.R. § 1630.15(b). The ADA excludes from the definition of "discrimination" the application of qualification standards, tests or selection criteria that are job-related and consistent with business necessity. 42 U.S.C. §§ 12112(b)(6); 29 C.F.R. § 1630.10. The employer may also assert, as a defense to a charge of discrimination, that its qualification standards, tests or selection criteria are job-related and consistent with business necessity. 42 U.S.C. § 12113(a); 29 C.F.R. § 1630.15(b). The inclusion of the same standard in the definition of discrimination and as a defense to such a charge raises unique burden of proof issues under the ADA that are most appropriately resolved by this Court.

intended to promote employment opportunities for individuals with disabilities, it is not intended to do so at the risk of their health or safety. Each and every employer must comply with federal and state safety regulations. Not only must employers operate safe and healthful work places, they are also prohibited from engaging in any business practices that endanger the health and welfare of their employees. 29 U.S.C. § 654(a) (OSHA); *see also* Cal. Lab. Code § 6402 ("No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe and healthful").

Employers must be allowed to balance their anti-discrimination obligations under the ADA with other legal obligations intended to promote the health and welfare of all employees. The EEOC regulations recognize and provide for such balance. 29 C.F.R. § 1630.15(e). Section 1630.15(e) states: "It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action . . . that would otherwise be required by this part." *Id.* This regulation ensures that an employer is not confronted with a charge of discrimination simply because it complied with its legal obligation and, moreover, is consistent with this Court's recent ADA jurisprudence.[4] *See Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555,

[4] The Ninth Circuit's opinion dismisses the potential liability confronting an employer should a disabled employee be harmed by the conditions that the employer had believed to be unsafe. App. 12a-13a. The Ninth Circuit states, without any authority, that the employer would be shielded from liability because the ADA would preempt state tort law. (*Id.* at 13a).

570 (1999) (recognizing that employer has unconditional obligation to follow safety regulations and a consequent right to do so without committing act of discrimination). Other Circuit Courts have similarly concluded that "[s]afety-based qualification standards are an accepted ground for a defense" under the ADA. *EEOC v. Exxon Corp.*, 203 F.3d 871, 873 (5th Cir. 2000) (safety standards may be justified as job-related and consistent with business necessity). Clearly, the employers' duty to comply with such laws and regulations at the Federal and state level is likely to "be critical" in their determination of whether an applicant is a "qualified individual with a disability." *Albertson's*, 527 U.S. at 580 (J. Thomas concurring opinion).

III. THE NINTH CIRCUIT CONSTRUES THE EMPLOYERS' DEFENSES TO CHARGES OF DISCRIMINATION UNDER THE ADA TOO NARROWLY

Even assuming that the employee could establish that he or she is a qualified individual with a disability and that the employer committed a prohibited act, the ADA affords the employer several defenses to a charge of discrimination. Among those defenses is the employer's

However, the Ninth Circuit completely ignores that the employer could face statutory liability for violating safety regulations by hiring an employee who will be harmed by the conditions of his or her employment simply because of the employee's particular disability. 29 U.S.C. § 654(a) (OSHA); *see also* Cal. Lab. Code § 6402. There is no basis to believe that the ADA would preempt Federal and state safety regulations intended to protect all workers. *Id.*

right to demonstrate that the qualification standards that have allegedly screened out the qualified individual with a disability are job-related and consistent with business necessity. 42 U.S.C. § 12113(a); 29 C.F.R. § 1630.15(b). The ADA does not enumerate permissible "qualification standards" because such standards are unique to both the particular job and the employer. Section 12113(b), however, does elaborate on one such standard, stating: "The term 'qualification standards' *may include* a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b) (emphasis added).

The Ninth Circuit seizes on the wrong word in this provision to justify its holding that employers may not consider the risk to the health or safety of the disabled individual when making employment decisions. App. 6a-7a. The Circuit Court concludes that the "direct threat" defense is only applicable where the individual creates a risk of harm to other individuals, but not where the individual's disability creates a risk of harm to himself, given the nature of his disability and the particular requirements of the position he is seeking. *Id.* This conclusion hinges on the use of the word "shall" in section 12113(b) of the ADA but ironically ignores the words "may include" just before. *Id.* The Ninth Circuit states:

> On its face, the provision does not include direct threats to the health or safety of the disabled individual himself. Moreover, by specifying only threats to 'other individuals in the workplace,' the statute makes it clear that threats to other persons – including the disabled individual himself – are not included within the scope of the defense.

Id. at 6a. Based on what the Ninth Circuit concludes is an unambiguous expression of congressional intent, the Court rejects the EEOC's broader definition of the term "direct threat," which expands the application of the "direct threat defense" to cases where the individual posed a risk of harm to himself.[5] *Id.*

While the Ninth Circuit's holding may reflect an accurate reading of the definition of the term "direct threat," it is not a proper construction of the scope of all of the defenses available to an employer under the ADA. App. 6a. Contrary to the suggestion of the Ninth Circuit, the statutory definition of "direct threat" in no way limits

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[5] The EEOC's decision to combine an available defense to a charge of discrimination based on the threat to the health or safety of an individual with a defense based on the "direct threat" to others makes sense from both a legislative and enforcement perspective. 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2). This combination ensures that employers make an "individualized assessment of the individual's present ability to safely perform the essential functions of the job" before determining that the individual is not a qualified individual with a disability. 29 C.F.R. § 1630.2(r). Such an assessment must be based on "reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence" and must consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur and the imminence of the potential harm. *Id.* By combining these two qualification standards, the EEOC ensures that the employer conducts the same level of individualized assessment regardless of whether the risk is to the individual alone or to others.

the other qualification standards that may be job-related and consistent with business necessity or other defenses that may be available under the EEOC regulations. 42 U.S.C. § 12113; 29 C.F.R. § 1630.15. Indeed, the language of Section 12113(b) is permissive and inclusive, not exclusive. 42 U.S.C. § 12113(b) ("[t]he term 'qualification standards' *may include* a requirement that an individual shall not pose a direct threat. . . . ") (emphasis added); *Exxon Corp.*, 203 F.3d at 873. Safety, medical and other physical requirements are not "exclusively cabined into the direct threat test." *Exxon Corp.*, 203 F.3d at 873 (rejecting EEOC's position that safety-requirements could only be justified if individual posed direct threat).

By misreading section 12113(b), however, the Ninth Circuit has unnecessarily and arbitrarily limited the defenses available to employers under the ADA. App. 6a-7a. Under its reasoning, an employer could almost never justify safety criteria even if they are job-related and consistent with business necessity. Such a holding contradicts the express language of sections 12112(b)(6) and 12113(a) of the ADA and therefore should not be permitted to stand.

IV. ANTI-PATERNALISM SHOULD NOT BE EXALTED WHERE AN EMPLOYER IS CONFRONTED WITH OBJECTIVE MEDICAL EVIDENCE FROM AN INDIVIDUALIZED ASSESSMENT THAT CONFIRMS A RISK OF SERIOUS INJURY OR DEATH

Despite the conclusions of the Ninth Circuit, paternalism is not the issue here. By sticking such a label on this case, the Ninth Circuit has failed to differentiate

between the blanket exclusions condemned by the ADA (and this Court in its Title VII jurisprudence) and the type of careful individualized assessment that the ADA requires and sanctions. App. 10a. The employer here did not disqualify the disabled individual because of stereotypical and misinformed assumptions about his qualifications for the job. Rather, the employer considered the objective medical evidence regarding Mr. Echazabal's condition in light of the demands of the job and considered the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm would occur and the imminence of the potential harm, as it was directed to do by the federal regulations and the EEOC guidance. 29 C.F.R. § 1630.2(r). Based on that assessment, the employer concluded that Mr. Echazabal could not perform the essential functions of the position sought without great risk to his health and safety. Unlike the blanket gender-based qualification standards at issue in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), and *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), physical, medical and safety criteria such as those at issue in this case, though uniformly applied, disqualify only those few individuals whose particular disability makes them susceptible to serious harm or injury given the essential functions of the position that they are seeking. *See also* Chevron U.S.A., Inc.'s Writ Petition at 27-28 n.6.

Requiring employers to assume a risk that the disabled individual is willing to ignore does not further the purposes of the ADA. Like other federal anti-discrimination statutes, the ADA requires the employer to "measure the person for the job and not the person in the abstract." *Dothard*, 433 U.S. at 332 (quoting *Griggs v. Duke Power Co.*,

401 U.S. 424, 436 (1971)). The objectives of the ADA would therefore be better served by ensuring that employers make employment decisions by assessing the individual's qualifications, the essential functions of the position and the objective medical evidence. *Chiari*, 920 F.2d at 317 (citing *School Bd. Of Nassau County v. Arline*, 480 U.S. 273, 284-85 (1987)). These individualized assessments minimize the possibility that unfounded assumptions about the risk to a disabled individual's health or safety factor into employment decisions and operate to exclude an otherwise qualified individual from the workforce solely because he is disabled.

The ADA, without question, seeks to make disabled individuals more autonomous. 42 U.S.C. § 12101. Personal autonomy, however, should not take precedence over personal safety. Such autonomy must yield where the individual, regardless of whether he is disabled under the ADA, seeks to accept employment despite objective medical evidence confirming that the position will jeopardize his health or safety. *Dothard*, 433 U.S. at 335 (upholding a regulation prohibiting women from serving as guards in Alabama's male maximum-security prisons because the "environment of violence and disorganization" of those institutions would place female prison guards at particular risk). In such a case, the employer should not be forced to assume that risk simply because the individual is willing to do so. As this Court concluded in *Dothard*: "More is at stake in this case, however, than an individual . . . [applicant's] decision to weigh and accept the risks of employment. . . . " *Id.*

At stake here is an employer's right, and indeed its responsibility, to adopt and apply appropriate job-related

physical, medical and safety criteria to protect the health and welfare of both prospective applicants and current employees regardless of disability. Quite simply, what is at issue is whether a disabled applicant must be afforded the unfettered opportunity to decide for himself whether he wants to accept a position that may kill him. The Ninth Circuit, through tortured statutory analysis, answers this question affirmatively. Employers Group respectfully submits that the ADA simply cannot compel American employers to accept the terrible burden of imposing what could well be a death sentence on a prospective employee.

CONCLUSION

Employers Group urges that the Petition for Writ of Certiorari of Chevron U.S.A., Inc. be granted.

Respectfully submitted,

FRED W. ALVAREZ
Counsel of Record
CHRISTINE A. KENDRICK
WILSON SONSINI GOODRICH & ROSATI
650 Page Mill Road
Palo Alto, California 94304
(650) 493-9300

Counsel for Amicus Curiae Employers Group

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